UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO BRANCH OFFICE

TARLTON AND SON, INC.

and

Cases 32–CA–119054
32–CA–126896

ROBERT MUNOZ, an Individual

Gary Connaughton, Esq.,
for the General Counsel.
James A. Bowles, Esq. (Hill, Farrer & Burrill LLP),
for the Respondent.
David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, ADMINISTRATIVE LAW JUDGE. This case was tried in Fresno, California, on October 15, 2014. Robert Munoz (Charging Party or Munoz) filed the charge and first-amended charge in case 32–CA–119054 on December 12, 2013, and January 14, 2014, respectively. Munoz filed the charge and first-amended charge in case 32–CA–126896 on April 17, 2014, and June 5, 2014, respectively. The General Counsel issued the consolidated complaint (the complaint) on July 23, 2014.

The complaint alleges that Tarlton and Son, Inc. (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by requiring its employees since early December 2013, as a condition of acceptance or continuation of employment, to sign agreements that compel the employees to mandatory binding arbitration. The complaint further alleges that Respondent implemented the mandatory binding arbitration policy because the employees engaged in protected concerted activities, including by participating in a State court class action wage and hour complaint against Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a California corporation, provides subcontractor construction services in the construction industry in the State of California from its office and place of business in Fresno, California, where it annually derives gross revenues in excess of $50,000. Respondent purchased and received goods at its facility in California valued in excess of $50,000 directly from sources outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent provides specialty subcontractor construction services to private and public properties in the State of California. Respondent employs approximately 150 to 250 painters, plasterers, dry wall hangers, tapers and finishers as well as 3 to 4 nonsupervisory clerical and administrative staff employees (Tr. 26–27, 181). Thomas (Tommy) Oliver Tarlton is Respondent's president, and has been responsible for labor relations at the Company since 1999 (Tr. 115). Tommy Tarlton maintains an open-door policy where an employee or group of employees may come to him with concerns about workplace problems (Tr. 106–107).

The Northern California Carpenters Union and the Southern California Carpenters Union (collectively, the Carpenters Union) represents many of the occupations employed by Respondent including dry wall hangers, tapers or dry wall finishers, lathers, plaster tenders and possibly laborers depending on the type of job being performed (Tr. 34–35, 51, 117–118). Several other occupations employed by Respondent are represented by other labor organizations or not represented (R Exh. 7). Respondent and the Carpenters Union are bound by 2 collective-

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R Exh." for Respondent's exhibit; "CP Exh." for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the Respondent's brief; and "CP Br." for the Charging Party's brief. On January 22, 2015, the Charging Party submitted a letter to me with copies to the General Counsel and Respondent calling to my attention a recent Board decision, *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), issued after the briefing period in this case ended. I have considered this additional Board decision in this case. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

bargaining agreements: the Southwest Drywall/Lathing Master Agreement, and the Northern California Drywall/Lathing Master Labor Agreement (Tr. 34; R Exh. 1, 2).[2]

B. The Class Action Wage and Hour Complaint

On November 7, 2013,[3] Munoz and two other employees (the plaintiffs) filed, in the Superior Court of the State of California, a collective action (the class action complaint) pursuant to various California Labor Codes on behalf of themselves and other employees similarly situated.[4] The class action complaint alleged that Respondent and other companies engaged in unfair business practices and violations of the California Labor Code including failure to compensate the plaintiffs for overtime and for various work-related activities performed off the clock such as driving to and from the job sites and traveling to paint stores (GC Exh. 2). The plaintiffs served Respondent with the class action complaint shortly after its filing (Tr. 21–22). After Respondent received a copy of the class action complaint, sometime between November 7 and November 19, Respondent contacted its attorneys regarding the class action complaint (Tr. 22, 57–60).

C. The Mutual Arbitration Policy

On November 19, Respondent's attorneys emailed Tommy Tarlton a draft mutual arbitration policy along with an employee agreement to arbitrate (collectively, the MAP) with specific language to assure the Carpenters Union that Respondent was not trying to avoid complying with the collective bargaining agreements (GC Exh. 3). Respondent's attorneys drafted the MAP after receiving a copy of the class action complaint from the Company (GC Exh. 4). That same day, November 19, Tarlton forwarded the draft MAP to Tony Canale, a representative of the Northern California Carpenters Union (GC Exh. 3; Tr. 60, 78). Tarlton asked Canale to review the draft MAP and "hopefully" approve the document.[5]

Tarlton testified that in addition to his email to Canale, he spoke to Canale several times regarding the MAP (Tr. 77, 84, 139). Tarlton testified that he asked Canale if he had forwarded the MAP to the Southern California Carpenters Union officials, to which Canale responded he had (Tr. 140). Tarlton testified that Canale "agreed it was okay for our company to implement [MAP]" as it did not supersede the collective bargaining agreement applicable to its members (Tr. 86, 140).

---

[2] Respondent apparently does not pay into the trust fund for the Northern California Carpenters Union (Tr. 34–50; 153–154, 174–176). The General Counsel argues that since Respondent does not pay into the trust fund, the employees are not actually represented by the Carpenters Union (GC Br. 3). However, based on my findings in this decision, sorting out the representation issue is not necessary.

[3] All dates contained herein are in 2013, unless otherwise indicated.

[4] According to the class action complaint, Respondent employed Munoz as a painter at the time of the filing (GC Exh. 2). Respondent, for the first time in its brief, alleges that it did not employ Munoz at the time of the implementation of the MAP. There is no evidence in the record to support this statement, and regardless, it is not relevant.

[5] The record does not contain a written response to Tarlton's November 19, 2013 email to Canale (GC Exh. 3). Canale did not testify at the hearing.

Tarlton testified that for several years prior to the filing of the class action complaint, he had discussed implementing a mutual arbitration policy at the Company but did not take steps to implement the MAP until November 2013 (Tr. 25–26). Tarlton gave conflicting testimony as to whether the implementation of the MAP occurred due to the class action complaint filed against Respondent. On cross-examination, Tarlton admitted that the decision to implement the MAP came within a few days after receiving the class action complaint (Tr. 59). However, Tarlton denied that the class action complaint prompted him to implement the MAP (Tr. 60). Tarlton also acknowledged that he had not spoken to anyone including his counsel in the 6 months prior to the filing of the class action complaint regarding implementation of a mutual arbitration policy at the Company (Tr. 60).

In late November or early December, Respondent presented to all its employees, both unrepresented and represented by labor organizations, with the MAP.[6] According to Tarlton, only a few employees expressed concern with the MAP but eventually every employee signed it (Tr. 184). Since December 2013, Respondent has required all employees, both represented and unrepresented by a labor organization, to sign, as a condition of their employment, the MAP (Tr. 33, 172–174). The MAP, 5 pages single-spaced in length, requires the employees to submit most legal claims arising out of their employment to binding arbitration.

The MAP states, in relevant part:

> **Notice to Employees About Our Mutual Arbitration Policy**
>
> Tarlton & Son, Inc. ("the Company") has adopted and implemented a new arbitration policy, requiring mandatory, binding arbitration of all disputes, for all employees, regardless of length of service. This memorandum explains the procedures, as well as how the arbitration policy works as a whole. Please take the time to read this material. IT APPLIES TO YOU. It will govern any existing and all future disputes between you and the Company that relate in any way to your employment.
>
> **Arbitration Policy & Procedures**
>
> The Company sincerely hopes that you will never have a dispute relating to your employment here. However, we recognize that disputes sometimes arise between an

[6] At the time of the issuance of the MAP to its employees, Respondent also requested its employees complete a survey regarding the allegations raised in the class action complaint (Tr. 192). Respondent also gave its employees a "release," "settlement agreement," or "waiver" to sign regarding the class action lawsuit filed by the plaintiffs (Tr. 194–202). However, the Complaint before me focuses on the implementation of the MAP at the Company, and not on what the employees were asked to sign once the MAP was implemented; apparently, that charge was dismissed prior to the hearing. The General Counsel admitted as such at the hearing, and the Charging Party objected, seeking to introduce this "release," "settlement agreement," or "waiver." I sustained the objection at the hearing, and rejected this document. Based upon my review of the Complaint, my ruling stands. In addition, per Charging Party's request in his brief, I decline to order Respondent to rescind the class action complaint waivers signed by the employees since that issue is not before me.

> employer and its employees relating to the employment relationship. We also recognize that not every dispute can be successfully resolved informally. The Company believes that it is in the best interests of the employees and the Company to resolve those disputes in a forum that provides the fastest and fairest method for resolving them based on the individual facts of your situation. Therefore, the Company has adopted and implemented this Mutual Arbitration Policy ("MAP") as a mandatory condition of employment.
>
> The MAP applies to all Company employees, regardless of length of service or status, and covers all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, whether those disputes already exist today or arise in the future. Examples of the type of disputes or claims covered by the MAP include, but are not limited to, claims against employees for fraud, conversion, misappropriation of trade secrets, or claims by employees for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964 and its amendments, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes or action recognized by local, state or federal law or regulations. The MAP does <u>not</u> cover workers' compensation claims, unemployment insurance claims or any claims that could be made to the National Labor Relations Board. The MAP also does <u>not</u> cover claims that are subject to the grievance and arbitration provisions of any collective bargaining agreement between the Company and a duly recognized labor Union representing you. Because it changes the forum in which you may pursue claims against the Company and effects your legal rights, you may wish to review the MAP with any attorney or other advisor of your choice. The Company encourages you to do so.
>
> <u>Your decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by the MAP.</u> Likewise, the Company agrees to be bound by the MAP. This mutual obligation to arbitrate claims means that both you and the Company are bound by use of the MAP as the only means of resolving any employment-related disputes covered by the policy. By agreeing to arbitrate, both you and the Company are agreeing to use procedures to arbitrate that may be materially different from the procedures that would apply in court. This mutual agreement to arbitrate claims also means that both you and the Company forgo any right either may have to a jury trial on claims related in any way to your employment. Because the arbitration proceeding will be a traditional, bilateral arbitration, it also means that both you and the Company forego and waive any right to join or consolidate claims in arbitration with others or to make collective or class claims in arbitration, either as a representative or a member of a class, unless such procedures are agreed to by both you and the Company. No substantive remedies that otherwise would be available to you individually or to the Company in a court of law, however, will be forfeited by virtue of this agreement to use and be bound by the MAP.

[Emphasis in original.] Employees sign a separate form titled, "Employee Agreement to Arbitrate" which states in relevant part:

> I acknowledge that I have received and reviewed a copy of Tarlton & Son. Inc.'s Mutual Arbitration Policy ("MAP") and have been provided an opportunity to request and review a Spanish translation as well, and I understand that the MAP is a condition of my employment. I agree that it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes, whether they exist now or arise in the future, that are related in any way to my employment or the termination of my employment with Tarlton & Son, Inc., except as otherwise permitted by the MAP. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tarlton & Son, Inc. or any affiliated companies or entities, and all of their owners, employees, officers, directors or agents ("the Company") and that, by agreeing to use arbitration to resolve my disputes, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the MAP, and forego any right to bring claims on a class or collective basis. I also agree that such arbitration will be conducted before an arbitrator chosen by me and the Company, and will be conducted before an arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the applicable procedural rules of the American Arbitration Association ("AAA"). which I have been provided an opportunity to request and review. The Company and I agree that nothing herein will prevent me or a Union representing me from filing a grievance and pursuing arbitration under a collective bargaining agreement between the Company and Union representing me.
>
> [GC Exh. 1(e), 1(p), 3.][7]

In summary, and relevant to this matter, Respondent requires that all employment-related disputes with its employees be resolved as individual claims exclusively through final arbitration. In other words, parties to a dispute cannot pursue claims related to the dispute, individually or collectively, or by class, in any judicial or court forum

III. ANALYSIS

A. Respondent's Requirement That Employees' Are Bound By the MAP Violates Section 8(a)(1) of the Act

The Complaint alleges, at paragraph 4, that since early December 2013, Respondent has required employees to be bound by the MAP which precludes class or collective litigation in any forum in violation of Section 8(a)(1).

(1) Respondent's MAP violates the Act by precluding class and/or collective actions.

[7] GC Exh. 3 include the English and Spanish versions of the MAP. However, to receive a Spanish version of the Company's MAP, the employee must request the Spanish version. It is unclear from the record whether this requirement posed a challenge to English illiterate employees who obviously would not be able to read the English version of the MAP to know to ask for a Spanish version of the MAP.

Respondent requires employees to agree to the MAP as a condition of employment. The MAP applies to all employees, regardless of length of service or status, and governs all disputes relating to or arising from employment with the Company. Beginning in December 2013, Respondent required all employees to sign the MAP to continue employment with the Company. Thus, I find that the MAP was a mandatory rule imposed by Respondent, and as such the MAP should be evaluated in the same manner as any workplace rule. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 15.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .". The Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7. See, e.g., *Spandsco Oil & Royalty Co*., 42 NLRB 942, 949–950 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982); *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12–60031, April 16, 2014). In *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014), the Board reaffirmed its ruling in *D. R. Horton*, where they held that mandatory arbitration agreements which preclude the filing of joint, class, or collective claims addressing wages, hours, or other working conditions in any forum, arbitral or judicial, is protected concerted activity and unlawfully restrict employees' Section 7 rights, which violates Section 8(a)(1) of the Act.

Since the Board's issuance of *D.R. Horton* there are have been several decisions issued by the Federal courts of appeal disagreeing with the Board's analysis regarding mandatory arbitration agreements. *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2014). Then, on October 28, 2014, the Board clearly and carefully reaffirmed its decision in *D.R. Horton*. *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014). The Board in *Murphy Oil* reexamined *D.R. Horton*, and determined that its reasoning and results were correct. The Board found that Section 8(a)(1) of the Act is violated when an employer requires its employees to agree to resolve all employment-related claims through individual arbitration. Mandatory arbitration agreements which bar employees from bringing joint, class, or collective actions regarding the workplace in any forum restrict employees' substantive right established by Section 7 of the Act to improve their working conditions through administrative and judicial litigation.

When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, *Inc.*; *Murphy Oil*. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied

to restrict the exercise of Section 7 rights. *Lutheran Heritage*, 343 NLRB at 647. The Board in *D.R. Horton* found that mandatory arbitration policies expressly violate employees' rights to engage in protected concerted activity under the *Lutheran Heritage* analysis. Likewise, I find that the MAP explicitly restricts Section 7. The MAP states in relevant part:

> This mutual agreement to arbitrate claims also means that both you and the Company forgo any right either may have to a jury trial on claims related in any way to your employment.

and

> Because the arbitration proceeding will be a traditional, bilateral arbitration, it also means that both you and the Company forego and waive any right to join or consolidate claims in arbitration with others or to make collective or class claims in arbitration, either as a representative or a member of a class, unless such procedures are agreed to by both you and the Company.

Respondent's MAP also requires employees to sign a statement certifying, "I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tarlton & Son, Inc. […] and forego any right to bring claims on a class or collective basis." Thus, the MAP clearly prohibits class actions in both judicial and arbitral forums.

Applying the Board's decisions in *D.R. Horton* and *Murphy Oil*, Respondent's MAP violates Section 8(a)(1) of the Act by requiring employees as a condition of employment to agree to resolve all employment-related claims through individual arbitration. Accordingly, I find that Respondent's maintenance of the MAP, as a condition of employment, prohibits employees from bringing forth claims against Respondent in a concerted manner which thereby violates Section 8(a)(1) of the Act as set forth in *D.R. Horton* and *Murphy Oil*.[8]

(2) The defenses raised by Respondent are without merit.

Respondent raises several arguments why I should not follow *Murphy Oil* and *D.R. Horton*. Respondent argues that I should instead follow the various Federal courts of appeals which have rejected the Board's rationale in *D.R. Horton* as well as the dissenting opinions in *Murphy Oil*. I find none of these arguments persuasive. Respondent failed to provide any argument distinguishing its mandatory arbitration agreement with the ones found in *D.R. Horton* and *Murphy Oil*. Because *Murphy Oil* and *D.R. Horton* are Board precedents that have not been overturned by the Supreme Court, I must follow them. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993); see also *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."). The

[8] At the hearing, under cross-examination, Tarlton, who testified he was responsible for labor relations at the Company since 1999 (Tr. 115), admitted that even he did not know which disputes required mandatory arbitration and which did not (Tr. 88–103). Where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." *Murphy Oil*, 361 NLRB No. 72, slip op. at 26 (2014).

arguments made by Respondent as to why *D.R. Horton* and *Murphy Oil* were wrongly decided, including its rejection by the courts, must be made directly to the Board.

Respondent alleges that Section 7 of the Act does not include the right to pursue class action complaint, and does not constitute protected concerted activity. Respondent relies upon the dissent in *Murphy Oil* to support its position. However, as the majority reaffirmed in *Murphy Oil*, "the NLRA does not create a right to class certification or the equivalent, but as the *D.R. Horton* Board explained, it does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (citing *D.R. Horton*, supra, slip op. at 10 fn. 24). Here, Respondent's MAP, as a condition of employment, precludes employees from pursuing claims concertedly and thus "amounts to a prospective waiver of a right guaranteed by the NLRA." *Murphy Oil*, supra, slip op. at 9 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940) and *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). This preclusion infringes on employees' Section 7 rights, and thus violates Section 8(a) (1) of the Act.

Respondent argues that even if the MAP restricts the employees' Section 7 rights, this restriction is not a violation of Section 8(a)(1) of the Act because the rights of the employees must be balanced with the business justification of the employer. Again, the *Murphy Oil* Board rejected this argument. The Board stated, "It is untenable to claim, as Member Johnson does, that prohibiting employees from pursuing their workplace claims collectively results only in 'relatively slight' interference with Section 7 rights, when it actually extinguishes them." *Murphy Oil*, supra, slip op. at 14. Again, this argument is rejected.

Respondent alleges that the Board's rationale in *Murphy Oil and D.R. Horton* conflict with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et. seq. However, the Board clearly set forth its reasons why the National Labor Relations Act does not conflict with or undermine the FAA. See *Murphy Oil*, supra, slip op. at 6. First, the Board found that mandatory arbitration agreements are unlawful under the FAA's savings clause because they extinguish rights guaranteed by Section 7. Second, Section 7 amounts to a "contrary congressional command" overriding the FAA. Finally, the Board found that the Norris-LaGuardia Act indicates that the FAA should yield to accommodate Section 7 rights. The Norris-LaGuardia Act prevents enforcement of private agreements that prohibit individuals from participating in lawsuits arising out of labor disputes.

Furthermore, Respondent argues that *AT & T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 fn. 4 (2012), *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), Supreme Court decisions issued after *D.R. Horton*, and other related case law,[9] support the argument that *D.R. Horton* must be rejected. Again, the Board in *Murphy Oil* addressed those arguments, distinguishing that Section 7 of the Act substantively guarantees employees the right to engage in collective

[9] Respondent requests that I follow the decision of Administrative Law Judge Keltner Locke in *Haynes Building Services, LLP,* No. 31–CA–093920 (February 7, 2014). This decision is not precedential, however, and to the extent it conflicts with the Board's case law, I am precluded from following it.

action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. See *Murphy Oil*, supra, slip op. at 7–9.

Respondent alleges that the Carpenters Union agreed to the implementation of the MAP thereby waiving the relevant statutory right of the employees whom it represents. However, I reject this defense as well. First, the Carpenters' Union does not represent all the employees of Respondent, and thus, could not have waived the rights of non-Carpenters' Union represented employees. Furthermore, putting aside the preliminary issue of whether a union can waive the Section 7 right involved here, an issue I do not reach,[10] Respondent has not established such a waiver on the facts of this case. Respondent's only evidence presented at trial regarding the agreement by the Carpenters Union was the uncorroborated hearsay testimony of Tarlton.[11] I do not credit Tarlton's testimony. Tarlton provided different versions of the discussions with Canale regarding the implementation of the MAP. On direct examination, Tarlton testified that Canale did not object to the implementation of the MAP in the very first conversation he had with him after the MAP had been emailed to Canale (Tr. 139–142; GC Exh. 3). Tarlton spoke with Canale before he emailed him the MAP in a conversation that lasted longer than the subsequent conversation after Canale reviewed the MAP (Tr. 145–147). In contrast, under cross-examination, Tarlton testified that he had three to five conversations with Canale before Canale agreed to the implementation of the MAP (Tr. 77). Tarlton testified that before Canale agreed to the implementation of the MAP, Canale reviewed the MAP. Thereafter, Canale and he had more conversations regarding the MAP and its impact on the negotiated grievance procedure (Tr. 84–86). Moreover, Respondent also failed to call Canale as a witness or provide any documentary evidence that the Carpenters Union waived its right to bargain over the implementation of the MAP.

Even assuming, however, that I could accept Tarlton's testimony set forth above, it does not meet the Board's standard for establishing a waiver of Section 7 rights. Under the Board's long settled "clear and unmistakable waiver" standard, the party asserting waiver has to establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The proof of a clear and unmistakable waiver is a fact specific inquiry. Respondent cites to *Berkline Corp.*, 123 NLRB 685 (1959), and *Shipbuilders (Bethlehem Steel)*, 277 NLRB 1548 (1986), to support its argument that the Carpenters Union waived their right to bargain regarding the MAP. Again, in those decisions, whose facts are not comparable to the fact-pattern presented in this case, the Board concluded that the evidence sufficiently showed that the union waived their rights to bargain. Here, the evidence, or lack of it, shows that Respondent informed the Carpenters Union of the planned change (GC Exh. 3). However, Respondent did not prove its heavy burden because the evidence presented is insufficient to show that the Carpenters Union *thereafter* agreed to the implementation of the MAP. Respondent failed to prove that it fully discussed the mandatory arbitration agreement

[10] See GC Br. 15–18 (arguing that the union cannot waive employees' Sec. 7 right to file class actions); and R. Br. 42–48 (arguing that the union can waive employees' Sec. 7 right to file class actions).

[11] At the hearing, over the Charging Party's objection, I permitted Tarlton to testify regarding his conversation with Canale. However, Tarlton's testimony was hearsay, and I give it only little weight since it was not supported by corroborating evidence.

with the Carpenters Union and that the Carpenters Union "consciously yielded its interest in the matter." *Alison Corp.*, 330 NLRB 1363, 1365 (2000).

In this case, it is clear under Board law that Munoz engaged in protected concerted activity when he filed his class action complaint in State court. See *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988) (filing a collective action to address wages, hours, and other terms and conditions of employment constitutes protected activity unless done with malice or in bad faith); *Harco Trucking, LLC*, 344 NLRB 478 (2005). Even without class member status, the evidence demonstrates that, by filing his class wide complaint, Munoz and the other plaintiffs sought to enlist the support of fellow employees in mutual aid and protection and intended to initiate or induce group action regarding alleged overtime pay violations and other labor violations against Respondent. Respondent implemented the MAP only after the employees filed a collective action in State court concerning working conditions. By implementing the MAP, Respondent sought to prevent the employees from working together in the future and had an illegal objective. Consequently, Respondent's action to force Munoz and other employees covered under the Act, to waive their right to file a class wide action in any arbitral or judicial forum, interfered with and restrained them from exercising their Section 7 rights. Respondent promulgated the mandatory arbitration agreement for all current and future employees only after the employees engaged in protected concerted activity.

Based on the foregoing, I find that Respondent's requirement as a condition of employment that employees are bound by the MAP violates Section 8(a)(1) of the Act as alleged in the Complaint.

B. Respondent's Implementation of the MAP Was Based on Protected Concerted Activity of Filing Class Action Matters, and Thus, Independently Violates Section 8(a)(1) of the Act

The Complaint alleges, at paragraph 5, that Respondent implemented the MAP after the employees filed a State class action wage and hour complaint. The MAP is a condition of employment, and is therefore treated in the same manner as other unlawfully implemented workplace rules. As set forth previously, when evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, supra. See *U-Haul Co. of California*, supra at 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, *Inc.*; *Murphy Oil*. In undertaking this analysis, the Board must refrain from reading particular phrases in isolation, and must not presume improper interference with employee rights. *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 7 (2014). The inquiry here is whether the second prong of the *Lutheran Heritage* test, if the rule was promulgated in response to protected concerted activity, is met. Although there are no Board cases directly on point with the facts of this case, the Board has found in many cases that implementation of a facially valid rule in response to the exercise of Section 7 rights violates the Act. See *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989); *Nashville Plastic Products*, 313 NLRB 462 (1993); *Jordan Marsh Stores*, 317 NLRB 460, 462 (1995); *Lincoln Center*, 340 NLRB 1100, 1110 (2003); *Jensen Enterprises*, 339 NLRB 877 (2003); *N. Hills Office Servicess.*, 346 NLRB 1099, 1113 (2006);. [12]

[12] Respondent argues that the second prong of *Lutheran Heritage* only applies to "union

Respondent argues that Munoz and the other employees involved in the class action complaint were not employed by the Company at the time the MAP was implemented, and thus those employees Section 7 rights were not affected. First, Respondent did not present any evidence of the employment status of the plaintiffs or the Charging Party at the trial. Secondly, it is irrelevant whether the plaintiffs were actually employed by the Company at the time the MAP was implemented. An "employee" includes "former employees of a particular employer." *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947); see also Sec. 2(3) of the Act; *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989). The Act does not place limitations on who may file a charge. See Sec. 10 of the Act; *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943).

Even if they were not employed by the Company in December 2013, when they are re-hired by Respondent, which is likely in the construction industry, as a condition of employment, they must agree to the MAP. All employees since December 2013 must agree to and sign the MAP which violates Section 8(a)(1) of the Act as set forth above.

Respondent implemented the MAP after the employees' worked in concert to file a class action lawsuit in State court. Although Tarlton testified that Respondent implemented the MAP not because of the class action and the topic of implementing a mandatory arbitration had been discussed by the Company's management for several years, the timing of the implementation is suspicious and points to an improper motive.[13] Although Tarlton provided generally sincere, specific and detailed testimony, I do not find him credible regarding the impetus and timing for the implementation of the MAP. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589–590 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-—or nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

Tarlton's own testimony essentially confirms that he made the decision to implement the MAP <u>because</u> of the class action complaint. Tarlton testified:

---

activity" not protected concerted activity. However, Respondent narrowly reads *Lutheran Heritage*. Protected concerted activity is a necessary precursor to union activity which are employees Sec. 7 rights. Contrary to Respondent's argument, the Board has applied the second prong of *Lutheran Heritage* to protected concerted activity, not only union activity. See e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014).

[13] Respondent argues that timing of the MAP's implementation alone would be insufficient to conclude that the mandatory arbitration agreement was promulgated in reaction to protected concerted activity (R. Br. at 53). As set forth above, my decision is not based simply on the timing of events but as a credibility analysis of the entire set of circumstances.

> Q. And to the best of your recollection, what was said by you and Mr. Canale during that conversation?
>
> A. I explained to him what it was that I was wanting to send him and why I wanted to send it to him, and I explained to him that typically I was always able to go through the grievance procedure and arbitration procedure set out in their agreement and it's worked great.
>
> And I realize now that I need to have that same ability for things that aren't in their ability to help me get quickly resolved. And so I said it's a mutual arbitration agreement that's going to allow us to deal with matters as they come up from time to time and not have it -- and be able to get resolution for my employees quickly no matter what it be so there's not a long, drawn-out process in solving problems in the future that typically went through the carpenters union, and they would have helped us get it resolved because they get stuff done quick. Like sometimes the same day that a problem arises, we get it resolved.
>
> If for some reason, there's a disagreement, it's within three, four weeks, you get a resolution of what to do and what's going to happen.

[Tr. 145-146.]

Tarlton testified that he realized he needed the MAP so he could "get resolution for my employees quickly no matter what it be so there's not a long, drawn-out process in solving problems in the future that typically went through the carpenters union [. . .]". Tarlton seems to suggest that after the class action complaint was filed he decided to implement the MAP. His denial that the implementation of the new rule was not due to the class action complaint is not believable. He must have been referring to the class action complaint as the "long, drawn-out process" he sought to avoid which is why he implemented the MAP. The Company clearly promulgated the MAP because it sought to chill employees from working together to file class action complaints in State court.

Moreover, Respondent drafted the MAP to include the class action complaint filed by the plaintiffs. The MAP states, "The MAP applies to all Company employees, regardless of length of service or status, and covers all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, *whether those disputes already exist today or arise in the future*." When reviewing the entire chain of events, it seems clear from the record that Respondent implemented the MAP, or promulgated the new rule, in response to the employees' protected concerted activity. Respondent sought to squelch the employees' pursuit of class action lawsuits in forums other than individual arbitration or the negotiated grievance process. Hence, Respondent promulgated the new rule in response to the employees' Section 7 activity, which violates Section 8(a)(1) of the Act.

Furthermore, Respondent's counsel during the investigatory stage of charge 32–CA–119054, states in its position statement to the General Counsel, "The MAP and Employee Agreement to Arbitrate were prepared by our office shortly after the lawsuit filed against Tarlton on November 7, 2013 by Robert Munoz [. . .]" (GC Exh. 4). Charge 32–CA–119054 concerned

an allegation that Respondent promulgated the MAP in response to union activity.[14] Respondent's counsel further explains in the position statement that it recommends mandatory arbitration agreements for many of its clients, and that the Company was unaware of "any union activity regarding the lawsuit." It may be that Respondent was unaware of any involvement in the class action complaint but Respondent was clearly on notice of the class action complaint which was filed by its employees. As stated above, the class action complaint falls within the ambit of protected concerted activity. This position statement is an admission against interest, albeit by Respondent's counsel, and thus persuasive evidence that Respondent implemented the MAP due to the filing of the class action complaint. The Board has held that "[a]n admission against interest may be used as evidence as well as to impeach and thus includes assertions made in position statements of counsel." *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993), enfd. mem. sub nom. *NLRB v. Pratt & Whitney*, 29 F.3d 621 (2d Cir. 1994); see also *United Scrap Metal Inc.*, 344 NLRB 467, 468 fn. 5 (2005) (submission statements submitted by counsel are admissions against interest by a party). Although Respondent prepared this response to the General Counsel in another charge which was later dismissed, this statement serves to corroborate the allegation that Respondent implemented the MAP in response to protected concerted activity by the employees.

Based on the foregoing, I find that Respondent promulgated and implemented the MAP after employees engaged in protected concerted activity by filing a state court class complaint which violates Section 8(a)(1) of the Act as alleged in the Complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By soliciting employees to sign and maintaining, since December 2013, a mandatory arbitration policy under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. By promulgating the mandatory arbitration policy in December 2013 at the Company in response to employees' protected concerted activity when they filed a state class action complaint, Respondent violated Section 8(a)(1) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAP is unlawful, the recommended Order requires that Respondent revise or rescind it, and advise its employees in writing that the MAP has been

[14] The General Counsel dismissed this charge, and thus, the issue of whether the Respondent promulgated the MAP in response to union activity is not before me.

revised or rescinded. Because Respondent utilized the MAP on a company-wide basis, Respondent shall post a notice in all locations where the MAP, or any portion of it requiring all and/or enumerated employment-related disputes to be submitted to individual arbitration, was in effect. See, e.g., *U-Haul of California*, supra, fn. 2; *D.R. Horton*, supra, slip op. at 17; *Murphy Oil*, supra, slip op. at 22. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

If applicable, I recommend Respondent be required to reimburse the Charging Party and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing any litigation and related expenses, with interest, to date and in the future, directly related to any motion to dismiss filed by Respondent related to the plaintiff's class action complaint. See *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 747 (1981) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

The Charging Party requests the following additional remedies: (1) rescission of the waivers signed by the employees in December 2013; (2) reporting to the Department of Labor the conduct of both Respondent and its counsel to ensure the filing of specific reports "as the persuader who was paid money 'to persuade employees to exercise or not to exercise…their right to organize'"; (3) reading of the notice to the employees by a Board agent who can explain the scope and effect of the remedy; and (4) mailing the Board decision to all employees. I shall not recommend any of these remedies. As stated previously, the issue of the waivers allegedly signed by the employees is not within the scope of the complaint, and thus, I will not recommend the requested remedy. Requiring an owner or high official of a company or a Board agent, to read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. The reading aloud of a notice is an "extraordinary" remedy, and has been ordered in egregious circumstances. *Federated Logistics & Operations*, 340 NLRB 255, 256-57 (2003); see also *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (ordered remedy included Board agent to read aloud notice to the employees to "ensure a free and fair rerun election"). In my opinion, the conduct of Respondent in this case does not warrant the recommendation of an "extraordinary" remedy. This rationale also supports my recommendation not to order either of the other remedies the Charging Party requests. Although Respondent maintains and promulgated an illegal workplace rule, it has not in any other manner, engaged in conduct designed to threaten, restrain or coerce its employees. Nor has it been shown that Respondent has violated the Act previously or that it will likely violate the Act in the future.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended[15]

ORDER

The Respondent, Tarlton and Son, Inc., Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign and maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Promulgating, in response to employees engaged in class or collective legal action, a mandatory arbitration policy, as a condition of employment, that prohibits class or collective actions in all forums, whether arbitral or judicial.

(c) Enforcing (or attempting to enforce) the mandatory arbitration policy to prohibit class or collective actions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mutual arbitration policy and the employee agreement to arbitrate (collectively, "MAP") in all of its forms, or revise it in all of its forms to make clear to employees that the does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign the MAP in any form that the MAP has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Reimburse Munoz and all plaintiffs for all reasonable expenses and legal fees, with interest, if any, incurred in opposing any litigation and related expenses, with interest, to date and in the future, directly related to any motion to dismiss filed by Respondent related to the plaintiff's class action complaint.

(d) Within 14 days after service by the Region, post at its facility in Fresno, California, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the

the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. January 27, 2015

Amita B. Tracy
Administrative Law Judge

---

notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT solicit employees to sign and maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT promulgate, in response to employees engaged in class or collective legal action, a mandatory arbitration policy, as a condition of employment, that prohibits class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT enforce the mandatory arbitration policy to prohibit class or collective actions by asserting it in the class action complaint filed by Charging Party Munoz and other plaintiffs against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mutual arbitration policy and the employee agreement to arbitrate (collectively, "MAP") in all its forms, or revise it in all its forms to make clear that the MAP does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign the MAP in any of its forms that the MAP has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL reimburse Charging Party Munoz and all plaintiffs for all reasonable expenses and legal fees, with interest, if any, incurred in opposing any litigation and related expenses, with

interest, to date and in the future, directly related to any motion to dismiss filed by the Company related to the plaintiff's class action complaint.

Tarlton and Son, Inc.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Oakland Federal Bldg., 1301 Clay Street, Room 300-N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-119054 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3253.